IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 421

ARSENAL BUILDING CORPORATION and SPEAR & CO., INC.,

Petitioners,

against

MEYER GREENBERG, suing in behalf of himself and other employees and former employees of defendants similarly situated,

Respondent.

BRIEF FOR THE RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

GEORGE TROSK,
Counsel for Respondent.

Of Counsel:
AARON BENENSON,
MONROE GOLDWATER,
JAMES L. GOLDWATER.

CORPORATE PRESS, INC., NEW YORK CITY

INDEX

Cases Cited.

Statutes Cited.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 421

ARSENAL BUILDING CORPORATION and SPEAR & CO., INC.,
Petitioners,

against

MEYER GREENBERG, suing in behalf of himself and other employees and former employees of defendant similarly situated,
Respondent.

BRIEF FOR THE RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

Opinions Below.

The opinion of the District Court holding plaintiff entitled to judgment is reported in 50 F. Supp. 700 (R. 464-472).* The memorandum opinion of the District Court adding interest upon respondent's motion to amend the judgment has not been reported officially but appears unofficially in 7 Wage Hour Rept. 144, 8 Labor Cases (C. C. H.) par. 62,071 (R. 461). The opinion of the Second Circuit Court of Appeals affirming the judgment in accordance with both of the opinions below has not been reported officially but appears unofficially in 7 Wage Hour Rept. 788, 8 Labor Cases (C. C. H.) par. 62,287.

* References are to pages of the printed transcript of record.

Jurisdiction.

The final judgment of the District Court was rendered October 26, 1943 in respondent's favor. The judgment as amended *nunc pro tunc* by order of the trial judge to add interest was filed February 5, 1944 (R. 454-456). An appeal was taken by the petitioners to the United States Circuit Court of Appeals for the Second Circuit and respondent filed a cross-appeal in that court from that part of the judgment granting him a counsel fee of $750 on the ground that such fee was insufficient (R. 473-474). On July 18, 1944 the Second Circuit Court of Appeals handed down its affirmance of the judgment in every respect except that upon respondent's cross-appeal the judgment of the District Court was modified to increase the attorney's fee allowed in that court to $1,250. On August 2, 1944 the Circuit Court of Appeals entered an order upon stipulation of the parties staying and withholding its mandate in the case for 30 days, pending application by petitioners for a writ of certiorari. The petition for certiorari was filed on September 1, 1944. Petitioners have invoked jurisdiction of this Court under Section 240 (a) of the Judicial Code (28 U. S. C. § 437), as amended by the Act of February 13, 1925.

Statement.

An adequate summary of the history of the proceedings appears in the petition for certiorari (Petition for Writ, pp. 3-6) and need not be repeated here.

To this suit for unpaid overtime, liquidated damages and counsel fee under the Federal Wage and Hour Law, defendants interposed three principal defenses, payment, estoppel and reformation. It was also urged that Section 16 (b) of the Act, under which recovery was had, deprives petitioners of property without due process of law, if

recovery of liquidated damages and counsel fees is to be permitted under the circumstances. Each of the three principal pleas involves an attempt to spell out from the terms of certain collective bargaining agreements, setting minimum standards for individual contracts of hiring in the industry of which petitioners and respondent were members, construction or implication of compliance with the Fair Labor Standards Act. Each of these defenses was held inadequate to bar recovery, both by the District Court and by the Circuit Court of Appeals, in view of the obvious fact that the collective agreements provided for overtime at the rate of time and one-half only for hours in excess of 48, 47 and 46 per week, in successive periods, whereas the Act's requirements necessitated payment of time and one-half to employees entitled to its benefits for hours in excess of 44, 42 and 40 per week during the first, second and subsequent years of its effect.*

The lower court found after trial that during the period covered by the complaint petitioners employed respondent (Findings 5, 8; R. 26-27) and failed to pay him overtime compensation at the rates provided for by Section 7 of the Act (Finding 9; R. 27).

With respect to the estoppel defense, the trial court found upon the facts that (1) both generally speaking, and in the case of the Arsenal Building, there appeared to be no particular correlation between labor costs and

---

* Respondent has maintained throughout that the full record of testimony regarding the various collective agreements and the negotiations preliminary thereto was irrelevant in an action of this character, the sole pertinent question being the hours actually worked by respondent and his fellow employees and the wages actually paid them during the period in suit, measured against the Act's overtime requirements. Prior to putting in evidence respondent moved to strike each of the affirmative defenses as insufficient in law and the motion was renewed at the close of the case. Respondent further opposed throughout admission of evidence relating to the various collective agreements and their interpretation, as irrelevant and immaterial, the action being founded upon the Fair Labor Standards Act, and the defenses in support of which the testimony was sought to be adduced being utterly inadequate in law. A general motion to strike all of the testimony introduced by petitioners was made at the close of the case.

the fixing of lease rentals; (2) petitioners failed to prove that they relied upon any action or omission of respondent or other employees in estimating labor costs or fixing lease rentals (Findings 12, 14; R. 29).

With respect to the counterclaim for reformation, the trial court found that petitioners failed to prove a mutual mistake of either fact or law respecting applicability or non-applicability of the Act in connection with the entering into of the various collective agreements referred to; and further found that the employer's representatives, at the negotiations leading up to the agreements, did not rely upon any statement or misstatement, or any act or omission, of the union representatives (Findings 14, 15; R. 29). The trial court further found that petitioners failed to prove a mutual understanding of the parties to the negotiations leading up to the collective agreements in question as to any specific provision, or actual terms, intended to be included in or to constitute their agreement as to wages and hours in the event that the Act applied to the employment relationship (Finding 16; R. 29-30). The evidence adduced by petitioners was not sufficient to satisfy the trial court that, but for the alleged mistake, petitioners or their representatives would not have assumed the terms and provisions sought to be reformed (Finding 20; R. 30). The court below denied petitioners' claim for affirmative relief also upon a further finding that they had delayed unreasonably in seeking reformation (Finding 17; R. 30).*

Not only did the trial court find, after a patient and painstaking development of testimony, that petitioners had failed to prove the essential facts pleaded in the principal

* Additional findings relating specifically to the testimony adduced in connection with the defense of payment (Findings 21-22; R. 30-31) and the question of concurrent liability of the petitioner Spear & Co. Inc., the managing agent (Findings 3-5, 23; R. 26, 31), may be treated in greater detail, for the sake of convenience, with the legal argument below.

defenses of estoppel, reformation and payment, but it was also held that those defenses were inadequate in law to bar recovery (Conclusions of Law 2-4; R. 34). The additional partial defenses, seeking to bar liquidated damages and counsel fees upon grounds of good faith and offer to pay the unpaid overtime without damages, and constitutionality, respectively, were similarly stricken (Conclusions of Law 5-6; R. 34).

These were the findings and conclusions of the trial court, which the Second Circuit Court of Appeals sustained in every particular, over the arguments here renewed.

Statutory Provisions Involved.

The applicable statutory provisions of Sections 7 (a), 16 (b) and 3 (d) of the Fair Labor Standards Act of 1938 (52 Stat. 1060; 21 U. S. C. §§ 201, *et seq.*), and Section 480 of the New York Civil Practice Act, have been set forth in full in the petition (Petition for Writ, pp. 22-23).

Questions Presented.

After a prolonged trial, the trial court held that the various affirmative defenses in this case were insufficient in law to bar the full recovery sought, and found that the petitioners had further failed to sustain the burden of proving material allegations necessary to support each of the principal defenses.

The questions presented, therefore, are: (1) Have the affirmative defenses of payment, estoppel and reformation, as pleaded, any validity in law or are they adequate, if proved, to bar recovery in a suit by an affected employee for back wages under the Fair Labor Standards Act; (2) with respect to those defenses, since each was based upon an essential factual background upon which the trial court's findings, sustained by the Circuit Court of Appeals

as in accord with the weight of the evidence, were all in respondent's favor, is there any substantial question for review by this court; (3) does recovery by respondent of liquidated damages, interest, attorney's fees and costs, in accordance with Section 16 (b) of the Act and Section 480 of the New York Civil Practice Act, deprive petitioners of property in violation of the Fifth Amendment to the Constitution of the United States; (4) was there any impropriety in the determination of the trial court, sustained by the Circuit Court, that petitioner Spear & Co. Inc., the managing agent, together with the building owner jointly "employed" plaintiff and his fellow workers within the meaning of the Act; (5) is the interpretation by the highest Court of New York that under its State Civil Practice Act interest is to be added to the amount of wages, including liquidated damages, recovered in a judgment such as that at bar, followed by the Circuit Court of Appeals in affirming here, subject to review in this Court?

ARGUMENT

I.

There is no novel or substantial question of construction of a Federal Statute in this case not heretofore determined by this Court.

Petitioners should be denied certiorari in view of the fact that the decision of the trial court, affirmed by the Second Circuit Court of Appeals, was in accord with the previous decisions of this Court and involved no novel or substantial question not heretofore determined here.

In the first place, validity under the Constitution of the United States of the overtime provisions of the Act was sustained in *U. S.* v. *Darby*, 312 U. S. 100 (1941);

the argument that the Act's basic requirements contravened the Fifth and Tenth Amendments to the Constitution was there specifically repudiated.

Next, this Court in a case involving the very employees who seek recovery in this action and the identical facts upon which they seek to base their recovery, in *Kirschbaum* v. *Walling* and *Arsenal Building Corp. and Spear & Co. Inc.* v. *Walling,* 316 U. S. 517 (1942), held on June 1, 1942 that this respondent and other building service and maintenance employees similarly situated, in their work for these petitioners, were engaged in occupations necessary to the production of goods for interstate commerce and entitled to the benefits of the Fair Labor Standards Act.

Finally, in *Overnight Motor Transport Co.* v. *Missel,* 316 U. S. 572 (1942) the Court upheld the validity under the Constitution of the United States of Section 16 (b) under which this action has been brought; held it mandatory in any case where violations have been established and recovery permitted that the trial court award also liquidated damages and a reasonable attorney's fee; set forth the formula for computing the amounts due where employees have been employed "under contract for a fixed weekly wage for regular contract hours which are the actual hours worked"; and ruled that recovery in a suit for back wages under the Act, given coverage and neglect or refusal to pay overtime in accordance with the Act's requirements, must follow "regardless of the good faith of the employer or the reasonableness of his attitude."*

Further, this Court in affirming the reversal of the lower court's finding for defendants, in *Arsenal Building*

* In the words of Mr. Justice Reed, which apply equally to the case at bar, "perplexing as petitioner's problem may have been, the difficulty does not warrant shifting the burden to the employee." There, as here, petitioner had pointed to the fact that "if there was a failure to pay the statutory overtime, it resulted from an inability to determine whether the employee was covered by the Act."

Corp. and Spear & Co. Inc. v. *Walling*, and in sending down its mandate that an injunction issue upon the whole record, conclusively established that violations of the Act occurred in connection with employment of plaintiff and his fellow workers under the identical facts here involved.*

Nor does the purported defense of estoppel constitute a novel or substantial question of interest here. This Court has consistently held that employees may not bargain away or release the right to receive the full sums to which they are entitled under the provisions of remedial legislation enacted in the public interest establishing minimum wage and hour standards for their protection. *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379. See also *U. S.* v. *Morley Construction Co.*, 98 F. (2d) 781 (C. C. A. 2), cert. den. *sub. nom.*, *Maryland Casualty Co.* v. *U. S.*, 305 U. S. 651. In fact this Court only in its last term had occasion to reaffirm the principle that "strong equitable considerations which, in relation to other types of legislation not so permeated with provisions and policies for protecting the general public interest" might move towards lending a forum to petitioners' plea of waiver or estoppel, may not avail against the rigid requirements of a statute designed for "securing the general public interest." See *Mid-State Horticultural Co.* v. *Penn. R. R. Co.*, U. S. , Sup. Ct. , 88 L. Ed. 83 (1943). See also *Pittsburgh C. & St. L. R. R. Co.* v. *Fink*, 250 U. S. 577.

And the existence of collective agreements is no excuse for failure to comply with the absolute requirements of the statute and no defense to an action maintained to recover for its violation. As was said here only a few months ago, Congress "did not intend that collective

---

* See transcript of record, *Arsenal Bldg. Corp. and Spear & Co. Inc.* v. *Walling* (sub. nom. *Fleming* v. *Arsenal Bldg. Corp. and Spear & Co. Inc.*, C. C. A. 2, Oct. Term, 1941) filed in this Court upon petition for writ of certiorari in No. 924, Oct. Term, 1941. Finding 29, R. 329.

agreements should relieve employers from paying overtime in excess of an actual workweek of 40 hours, regardless of the provisions of such contracts." *Tennessee Coal, Iron & R. R. Co.* v. *Muscoda Local No. 123*, U. S. , Sup. Ct. , 88 L. Ed. 610 (1944).*

Nor has the defense of payment any novelty here. In virtually the same form it has been specifically rejected at least twice, which has not dissuaded petitioners from raising it again. See *Overnight Motor Transport Co.* v. *Missel*, 316 U. S. 572 (1942), where the appropriate method for computing overtime in a case such as that at bar was indicated.** To the same effect see *Warren-Bradshaw Drilling Co.* v. *Hall*, 317 U. S. 88, 93 (1942); *Floyd* v. *Dubois Soap Co.*, 139 Ohio St. 520, 41 N. E. (2nd) 393, reversed per curiam in 317 U. S. 596 (1942).

Finally, there is no novel or substantial question to be reviewed in the finding of the lower court, sustained by the Circuit Court of Appeals, that both upon the facts and upon the law, plaintiff should recover against the defendant managing agent as well as against the defendant owner. In *N. L. R. B.* v. *Penn. Greyhound Lines, Inc.*, 303 U. S. 261, a managing company which performed "various services relating to the employee personnel" for an affiliated operating company, was held likewise an "employer" within the meaning of the National Labor

---

* The Court further said in that case: "Congress intended * * * to achieve a uniform national policy of guaranteeing compensation for all work or employment engaged in by employees covered by the Act. Any custom or contract falling short of that basic policy, like an agreement to pay less than the minimum wage requirements, cannot be utilized to deprive employees of their statutory rights."

** The Court there stated that "no problem is presented in assimilating the computation of overtime for employees under contract for a fixed weekly wage for regular contract hours which are the actual hours worked." And the Court added the formula, in a footnote, "wage divided by hours equals regular rate. Time and one-half regular rate for hours employed beyond statutory maximum equals compensation for overtime hours," and rejected petitioner's resort to a purported presumption that the contracting parties contemplated compliance with the law.

Relations Act*; as Mr. Justice STONE said there, "together, respondents acted as employers * * * and together actively dealt with labor relations of those employees." And the Court, as recently as the last term, indicated that the statutory definition is the only test of "employer" under the Act. *N. L. R. B.* v. *Hearst Publications, Inc.*, U. S. , Sup. Ct. , 88 L. Ed. 824 (1944). Accordingly, "technical concepts pertaining to an employer's legal responsibility for acts of his servants" have no bearing.**

This Court has thus already ruled adversely to petitioners upon every question of substance raised in support of the petition and the decision below was in all respects in harmony with applicable decisions of this Court.

II.

The case was decided in complete accord with innumerable decisions of the Circuit Courts of Appeals and high state courts.

There is no substantial divergence of authority in the various Circuit Courts of Appeals and high state courts upon the issues determined in this case. The decision below, affirmed by the Second Circuit Court of Appeals, was in keeping with a very considerable weight of authoritative decisions of appellate tribunals. Five different Circuit Courts of Appeals have recently indicated that Section 7 of the Wage and Hour Act is violated, and a cause of action in double the amount of underpayment accrues to the employee, immediately upon the employer's failure,

---

* The appositeness of the decisions interpreting the National Labor Relations Act is clear from the similar purposes of the two statutes, as well as the fact that Section 3(d) of the Fair Labor Standards Act is virtually identical with and adopted from Section 2(2) of the National Labor Relations Act. Compare 29 U. S. C. § 203 (d) and 29 U. S. C. § 152 (2).

** See *International Association of Machinists* v. *N. L. R. B.*, 311 U. S. 72, 80-81.

even in good faith, to pay the required overtime currently at the time when earned in the regular course of employment,*

Under the circumstances, defenses such as implication of compliance with the Act, estoppel and reformation for mutual mistake, which petitioners have sought to raise, must fail in law because they "tend to frustrate the administration of the Act and contravene its policy." See *Adams* v. *Union Dime Savings Bank*, F. (2d) , 7 Wage Hour Rept. 789, 8 Labor Cases (C. C. H.) par. 62,286 (1944).**

Further, it may be said that what these defenses really seek is, in effect, to establish a defense in bar or an estoppel based upon an alleged mistake or misconception as to the applicability of existing law, whereas it has long been clear that equity may not grant reformation for such a mistake. See *Hunt* v. *Rousmanier's Administrator*, 1 Peters (U. S.) 1 (1828). See also *Bank of U. S.* v. *Daniel*, 12 Peters (U. S.) 32 (1838); *Staten Island Hygeia Ice & Cold Storage Co.* v. *United States*, 85 F. (2d) 68 (C. C. A. 2); *Lucking* v. *Schram*, 117 F. (2d) 160 (C. C. A. 6).†

Passing from so-called equitable considerations to the purported defense of payment, petitioners have sought to infer that employees employed pursuant to standards

---

* *Geo. Lawley & Son Corp.* v. *South*, 140 F. (2d) 439 (C. C. A. 1, 1944), cert. den. U. S. , May 11, 1944 (No. 908, Oct. 1943 Term); *Rigopoulos* v. *Kervan*, 140 F. (2d) 506 (C. C. A. 2, 1943); *Guess* v. *Montague*, 140 F. (2d) 500 (C. C. A. 4, 1943); *Birbalis* v. *Guneo Printing Industries*, 140 F. (2d) 826 (C. C. A. 7, 1944); *Seneca Coal & Coke Co.* v. *Lofton*, 136 F. (2d) 359 (C. C. A. 10, 1943), cert. den. 320 U. S. 772. See also *Emerson* v. *Mary Lincoln Candies*, 173 Misc. 531, 174 Misc. 353, aff'd. 261 A. D. 879, affd. 287 N. Y. 577 (Ct. App. N. Y.); *Abroe* v. *Lindsay Bros. Co.*, 211 Minn. 136, 300 N. W. 457 (Sup. Ct. Minn.).

** The appellate courts of New York State have reached the same conclusion. See *Walsh* v. *515 Madison Ave. Corp.*, 267 A. D. 756 (App. Div. N. Y. 1st Dept. 1944) affirming 181 Misc. 219 (Sup. Ct. N. Y. Co. 1943) and *Garrity* v. *Bagold Corp.*, 267 A. D. 353 (App. Div. N. Y. 1st Dept. 1944) modifying and affirming 42 N. Y. Supp. (2d) 257 (Sup. Ct. N. Y. Co. 1943).

† Compare the recent amendment to the New York Civil Practice Act, Section 112 (f), made effective only on May 29, 1942, subsequent to the period covered by the present suit. L. 1942, c. 558, Laws of the State of New York.

established by collective agreements for a fixed agreed number of hours, regularly worked weekly, of 48, 47 and 46 in different periods, for which they were paid a regular weekly wage, with no additional compensation for overtime up to the contracted for number, were paid in accordance with the Act's overtime requirements, ignoring the fact that the Act at the same time called for time and one-half for hours in excess of 44, 42 and 40 per week during successive years. The contention is clearly contrary to the plain mandate of Section 7 of the Act. The theory that by implication the provisions of the collective agreements, or the individual contracts of hiring, may be so construed as to infer compliance, based upon assumed rates which are not the real rates, has been repudiated by authoritative decisions wherever raised.*

As Mr. Justice REED said in *Overnight Motor Transport Co.* v. *Missel*, 316 U. S. 572, "implication cannot mend a contract so deficient in complying with the law" as was the collective agreement principally drawn in question here.

Finally, as the Second Circuit pointed out in affirming the present case, liability of the managing agent Spear & Co. here was intimated in the earlier decision in *Fleming* v. *Arsenal Bldg. Corp.*, 125 F. (2d) 278 (C. C. A. 2, 1941), affd. 316 U. S. 517 (1942).**

---

* See *Missel* v. *Overnight Motor Transport Co.*, 126 F. (2d) 98 (C. C. A. 4, 1942); *Warren-Bradshaw Drilling Co.* v. *Hall*, 124 F. (2d) 42 (C. C. A. 5, 1941); *Carleton Screw Products Co.* v. *Fleming*, 125 F. (2d) 537 (C. C. A. 8, 1941); *Bumpus* v. *Continental Baking Co.*, 124 F. (2d) 549 (C. C. A. 6, 1941); *Mid-Continent Petroleum Co.* v. *Hargrave*, 129 F. (2d) 655 (C. C. A. 10, 1943); *Tidewater Optical Co.* v. *Wittkamp*, 179 Va. 545, 19 S. E. (2d) 897 (Sup. Ct. Va. 1941); *Walling* v. *Stone*, 131 F. (2d) 461 (C. C. A. 7, 1942); *Patsy Oil Corp.* v. *Roberts*, 132 F. (2d) 826 (C. C. A. 10, 1942); *Graves* v. *Armstrong Creamery Co.*, 154 Kans. 365, 118 P. (2d) 613 (Sup. Ct. Kans. 1941); *Seneca Coal & Coke Co.* v. *Lofton*, 136 F. (2d) 359 (C. C. A. 10, 1943). See also *Garrity* v. *Bagold*, 42 N. Y. Supp. (2d) 257 (Sup. Ct. N. Y. Co. 1943), affd. 267 App. Div. 353 (App. Div. N. Y. 1st Dept. 1944); *Walsh* v. *515 Madison Ave. Corp.*, 181 Misc. 219 (Sup. Ct. N. Y. Co. 1943) affd. 267 App. Div. 756 (App. Div. N. Y. 1st Dept. 1944).

** "We may ignore the defendant, Spear & Co., Inc., for any decision as to it must concededly follow that as to the Arsenal Building Corporation." *Fleming* v. *Arsenal Building Corp.*, 125 F. (2d) 278 (C. C. A. 2, 1941).

III.

Each of the principal defenses presented factual issues upon which the trial court's findings, sustained by the Circuit Court of Appeals, were all in respondent's favor and there is no substantial question for review here.

It may be said further, in opposition to the granting of a writ for certiorari here that each of the principal defenses is based upon an essential factual background upon which the trial court's findings, sustained by the Second Circuit Court of Appeals as in accord with the weight of the evidence, were all in petitioners' favor, and there is no substantial question for review by this Court.*

IV.

All constitutional questions invoked by petitioners have already been passed upon by this Court.

Petitioners have urged, as a further ground for the granting of certiorari, that imposition of the mandatory liability for liquidated damages and counsel fees upon violation, where there was difficulty in determining applicability of the Act, was violative of the due process clause of the Fifth Amendment to the Federal Constitution. This precise point has already been passed upon here and rejected by this Court. See *Overnight Motor Transport Co.* v. *Missel*, 316 U. S. 572 (1942). See also *U. S.* v. *Darby Lumber Co.*, 312 U. S. 100 (1941); *Kirschbaum* v. *Walling*, 316 U. S. 517 (1942).

* See reference to principal findings upon the various defenses, pages 3-5 above.

V.

Interpretation by the highest court of New York that under its Civil Practice Act interest is to be added to the amount of wages, including liquidated damages, recovered in the judgment, followed by the Circuit Court in affirming here, is not subject to review in this Court.

The decisions of the courts of the State of New York interpreting and applying Section 480 of the New York Civil Practice Act hold that the provision that interest in such cases "shall be added to the total sum awarded" is a mandatory provision of law absolutely binding upon courts and clerks in all cases involving suits upon contract, express or implied, whether involving liquidated or unliquidated claims. *Mayaguez Drug Co.* v. *G. & R. F. Ins. Co.*, 260 N. Y. 356; *McLaughlin* v. *Brinckerhoff*, 222 App. Div. 458; *Joannes Bros. Co.* v. *Lamborn*, 226 App. Div. 777; *Newburgh Dress Co.* v. *Nadler & Nadler, Inc.*, 251 App. Div. 330; *Greater N. Y. Coal & Oil Corp.* v. *Philadelphia Coal Distributing Co. Inc.*, 252 App. Div. 883.*

Established by authoritative decisions here is the fact that the provisions of Section 480 of the Civil Practice Act, and the decisions of the courts of New York interpreting those provisions, are applicable law conclusive in this Court. *Massachusetts Benefit Assn.* v. *Miles*, 137 U. S. 689. Compare *Klaxon Co.* v. *Stentor Elec. Mfg.*, 313 U. S. 487, where the Court recently declined to apply Section 480 upon the specific ground that the case there

* An action under Section 16 (b) of the Fair Labor Standards Act is an action founded upon contract, and one specifically to recover wages, with respect to both unpaid overtime and the mandatory liquidated damages. *Rigopoulos* v. *Kervan*, 53 F. Supp. 829 (S. D. N. Y. 1943); see also *Northwestern Yeast Co.* v. *Broutin*, 133 F. (2d) 628 (C. C. A. 6, 1942). It has been held that the right to interest under Section 480 continues and is not waived "though not demanded in the complaint or proved on the trial." *Quinn* v. *Sigretto*, 229 A. D. 727 (App. Div. N. Y. 2nd Dept. 1930).

involved required application of the local law of the State of Delaware, rather than that of New York, under applicable principles of conflicts of law. See also *Funkhouse* v. *J. B. Preston Co.*, 290 U. S. 163.

The New York Court of Appeals held on June 14, 1944 in *Pederson* v. *Fitzgerald Construction Co.*, ~~288 N. Y. 818~~, 293 N.Y. that a plaintiff recovering unpaid overtime and liquidated damages under the Fair Labor Standards Act is entitled, by virtue of Section 480 of the New York Civil Practice Act, to interest upon the full sums recovered, including liquidated damages. This interpretation of a statutory provision of the law of the State of New York by the highest court of that state is not subject to review here. See *Erie R. R.* v. *Tompkins*, 304 U. S. 64 (1938). See also 28 U. S. C. § 725. In any event the New York statute provides a "suitable rate" of interest. *Royal Indemnity Co.* v. *U. S.*, 313 U. S. 289, 297 (1941).

VI.

No adequate reason is set forth in the petition for the granting of a writ of certiorari and the application therefor should be denied.

Respectfully submitted,

GEORGE TROSK,
Counsel for Respondent.

Of Counsel:
AARON BENENSON,
MONROE GOLDWATER,
JAMES L. GOLDWATER.